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UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

 Plaintiffs,

 v.

 WILBUR L. ROSS, JR., et al.,

 Defendants.

CASE NO. 5:20-cv-05799-LHK

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PLAINTIFFS' MOTION TO COMPEL
 TIMELY PRODUCTION OF
 DOCUMENTS AND FOR RELATED
 RELIEF**

Date: December 11, 2020
 Time: 1:30 p.m.
 Place: Courtroom 8
 Judge: Hon. Lucy H. Koh

1 On November 13, 2020, the Court ordered a limited and expedited eight-week fact
2 discovery period in this case, to be followed immediately by a shortened expert discovery period,
3 a summary judgment phase, and trial (if needed) in March. ECF No. 357. Defendants wanted
4 more time for fact discovery (three months); Plaintiffs wanted less (one month). ECF No. 356.
5 But the Court chose a middle approach to the parties' competing positions on case scheduling,
6 the heart of which was the swift resolution of narrow document discovery, with Plaintiffs limited
7 to 25 Requests for Production and Defendants required to meaningfully produce responsive
8 materials starting within two weeks of service of such requests. Swift document production was
9 essential because the rest of the schedule (limited Interrogatories and Requests for Admission,
10 limited fact depositions, expert reports, and so on) was dependent on the expedited production of
11 such materials.

12 Plaintiffs are forced to file the instant motion to compel because Defendants are refusing
13 to timely produce materials, thereby seeking to prejudice Plaintiffs and sabotage the Court's
14 schedule. It has been three weeks since Plaintiffs issued a carefully crafted, narrowly-tailored set
15 of document requests. *See* Makker Decl., Exs. 1, 2. For two weeks, Defendants refused
16 Plaintiffs' multiple requests to meet and confer in order to deal with common issues such as
17 keyword search terms, custodians, date ranges, the identification of summary reports that would
18 allow swift compliance with the bulk of Plaintiffs' requests, and so on. Makker Decl., Ex. 3.
19 Instead, without having met and conferred and in faux compliance of the Court's order,
20 Defendants produced 175 duplicate-riddled documents on December 1 (the mandated 14-day
21 deadline). After Plaintiffs vociferously complained, and after finally agreeing to meet and confer
22 on December 2 and again just yesterday on December 8, Defendants claim to be "working" on
23 actual, meaningful production. *See* Makker Decl., Exs. 4, 5.

24 But their actions speak louder than words. Despite being warned repeatedly that
25 Plaintiffs would be forced to file an expedited motion to compel if Defendants refused to timely
26 produce, Defendants sent late last night a supplemental production of 516 documents, 391 of
27 which predate the Bureau's August 3 announcement of the Replan (and thus tell Plaintiffs and
28 the Court nothing about Defendant's actual data collection and data processing issues), are filler

documents such as meeting invites, and duplicates once again. Defendants also failed to provide even the most basic metadata that would have allowed Plaintiffs to identify duplicate documents automatically in a database. In the limited time since Defendants made their production late last night, Plaintiffs undertook a *manual* review of the documents in order to determine that, of the 691 documents Defendants have thus far produced:

- There are 116 calendar invites (or cancelled calendar invites) that contain no substantive information;
- There are 55 copies of a presentation titled “Nonresponse Followup (NRFU) Soft Launch, dated June 10, 2020;
- There are 52 copies of a Senior Management Agenda, dated June 10, 2020;
- There are 27 copies of a document titled, “Status Reporting: Phased Restart for the 2020 Decennial Census (Periodic Reporting: Release for June 8, 2020)”;
- There are 26 copies of a document titled, “Status Reporting: 2020 Decennial Census - Executive Order 13880 (Release for June 8, 2020)”;
- There are 24 copies of a document titled, “Status Reporting: 2020 Decennial Census (Periodic Reporting: Release for June 8, 2020)”;
- There are 22 copies of an undated document titled, “Department of Commerce – Second Term Key Priorities”; and
- There are 22 copies of a document titled, “Status Reporting: Phased Restart for the 2020 Decennial Census,” dated June 8, 2020. *See* Makker Decl., Ex. 6.

This is not compliance. And it is particularly egregious here, given Defendants’ history of defying this Court’s orders and approach of delay and obfuscation. That Defendants have not yet produced any reports sufficient to allow Plaintiffs to assess the accuracy of Defendants’ truncated census count and completion rates—or any documents sufficient to allow Plaintiffs or the Court to know anything about the current data processing period—is untenable. Indeed, Defendants have told Plaintiffs that most of the narrowly tailored data reports Plaintiffs seek will be produced near the end of December—which would be approximately *one week* before the close of fact discovery, and only *two weeks* before expert reports are due. As for the rest of the materials—including vital documents laying out the current status and schedule of data processing and the ultimate delivery of state population counts to the President—Plaintiffs know nothing regarding eventual production. It is clear that Defendants have unilaterally decided to give themselves the three months of discovery this Court *denied* them. Because if document production is not completed until the end of December—and fact discovery ends on January 7—

1 there is no meaningful way that Plaintiffs can conduct fact depositions, issue narrowly tailored
 2 Interrogatories or Requests for Admission directed at the core issues in this case, or produce full
 3 and robust expert reports by January 14. Plaintiffs waited until Defendants’ second production,
 4 last night, in hopes that Defendants would finally produce real materials and that the parties
 5 could move forward without the need for yet additional motion practice in this case. That was
 6 not to be.

7 Perhaps worst of all, and in a sign that history does often repeat itself, Defendants’
 8 intransigence has been independently confirmed—via Congressional leaks. The Court will recall
 9 that in early August, Defendants professed ignorance of any Replan specific timelines or
 10 processes until Congress leaked the August 3, 2020 Replan presentation. *See, e.g.*, Sept. 4, 2020
 11 Hr’g Tr. at 29:4-24, 32:24-33:25; ECF No. 66-2, para. 5; ECF 66-3. Last week, almost
 12 immediately after Defendants had (finally) met and conferred with Plaintiffs about the
 13 insufficient initial production of 175 documents (many of which are duplicates of each other or
 14 previously produced materials, and none of which was current (*see* Makker Decl., Ex. 6)), media
 15 reports indicated that the House Committee on Oversight and Reform had in fact demanded very
 16 similar documents from Defendants. *See* [https://talkingpointsmemo.com/news/census-internal-](https://talkingpointsmemo.com/news/census-internal-docs-delays)
 17 [docs-delays](https://talkingpointsmemo.com/news/census-internal-docs-delays). The reports indicated that *a week prior*, Census Director Dillingham had told the
 18 House Committee that they had identified documents, and had sent them to the Commerce
 19 General Counsel, but would not produce them because of “ongoing litigation”—i.e., this case.
 20 *Id.*

21 Specifically, according to Chairwoman Maloney of the Committee on Oversight and
 22 Reform, at a November 24, 2020 briefing, Defendant Dillingham and “other top Census Bureau
 23 officials,” “reported that documents responsive to the Committee’s November 19 request had
 24 been submitted to [the] General Counsel at the Department of Commerce on November 24,
 25 2020, but had not been cleared for release to the Committee due to ‘concerns about ongoing
 26 litigation.’” Makker Decl., Ex. 7. The Committee noted that the Commerce Department’s
 27 response raised concerns “whether the Administration is seeking to conceal information not only
 28 from Congress, but from the Judiciary.” *Id.*

1 The few leaked documents that Congress did obtain were precisely the sorts of materials
 2 Plaintiffs asked for weeks ago, but Defendants have not produced—including “documents
 3 relating to [] anomalies, the predicted delays they would cause, and their potential impact on the
 4 accuracy of the Census count.” *Id.* The letter referenced “several internal Census Bureau
 5 documents from another source that not only confirm [reports that they will be unable to produce
 6 a complete and accurate 2020 Census count prior to late January and possibly into February
 7 2021], but indicate that unresolved errors may be more extensive than first reported.” *Id.* The
 8 leaked documents, titled “DRF1 Anomaly Summary” and “DRF1 Anomaly Tracker – Active
 9 Issues,” and “2020 Census Post Collection Processing” (Makker Decl., Exs. 8, 9), are
 10 indisputably relevant to this litigation. And Defendants have withheld them and like documents
 11 from production, apparently by seeking to shield them via the General Counsel at the
 12 Department of Commerce.

13 A party may move for an order compelling production if another party fails to produce
 14 documents as requested under Rule 34. *Amazing Insurance Inc. v. DiManno*, No. 2:19-cv-
 15 01349-TL-CKD, 2020 WL 5440050, at *3 (E.D. Cal. Sep. 10, 2020). The party seeking to
 16 compel production of documents must make a threshold showing that the discovery sought is
 17 relevant. *Id.* (citing *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 438-39
 18 (9th Cir. 1992)). Once relevancy is shown, the party resisting discovery has the burden to show
 19 that discovery should not be allowed. *Id.*

20 There is no question regarding relevancy, and no legitimate argument that discovery of
 21 the key, limited information sought by Plaintiffs is inappropriate. The issue is simply one of
 22 timing—and Defendants have caused great delay and prejudice to Plaintiffs by failing to provide
 23 the requested materials within the Court’s ordered schedule. Plaintiffs will continue to work
 24 with Defendants to obtain a full set of documents in response to Plaintiffs’ limited requests.¹ If
 25

26 ¹ For example, now several weeks after Plaintiffs’ initial requests to meet and confer, Defendants
 27 are finally engaging on appropriate search terms, custodians, and the like. Plaintiffs do not wish
 28 to trouble the Court at this time with mundane matters that should have been worked out by the
 parties weeks ago, nor with the Parties’ discovery correspondence and back-and-forth. Instead,
 with the Court’s guidance on the requests made herein, Plaintiffs will work diligently to resolve
 as much as possible without the Court’s additional intervention.

1 that fails, then Plaintiffs may well have to come to this Court again, and soon, on another
 2 expedited motion to compel—broader than this one. But given the second inappropriate
 3 production last night, Plaintiffs cannot wait before seeking to compel Defendants to produce
 4 certain critical, clearly relevant materials *now*. Plaintiffs likewise can no longer trust
 5 Defendants’ counsel to engage in timely and appropriate meet and confer efforts—consistent
 6 with the Court’s schedule, and not the schedule Defendants wish were in place—when
 7 Defendants’ primary motivation is delay, and their counsel professes ignorance on the specifics
 8 of their clients’ discovery processes, positions, and actions. In order to have any hope of
 9 meeting the expedited schedule in this case, Plaintiffs therefore respectfully ask that the Court to:

- 10 1. Order Defendants to produce, by Monday, December 14, 2020, documents
 11 sufficient to show the details of the Bureau’s current data-processing plans,
 12 procedures, and schedule (including changes) since October 15, 2020;
- 13 2. Order Defendants to produce, by Monday, December 14, 2020, documents
 14 responsive to requests from the House Committee on Oversight and Reform
 15 and Census Integration Group (“CIG”) documents. The documents described
 16 in the Committee on Oversight and Reform’s December 2, 2020 letter identify
 17 numerous anomalies in the Bureau’s collected data that the Bureau has
 18 indicated would impact substantial numbers of census records as well as the
 19 ability of the Bureau to transmit apportionment figures. There is no dispute
 20 that these documents exist, are relevant to this litigation and responsive to
 21 Plaintiffs’ requests, and are not protected by any legitimate privilege or
 22 protection precluding production. According to Defendant Dillingham, those
 23 documents have *already* been prepared and submitted to the General Counsel
 24 at the Department of Commerce for safekeeping from this litigation, and are
 25 therefore ready to be produced immediately.
- 26 3. Order Defendants to produce, by Monday, December 14, 2020, all summary
 27 report data responsive to Defendants’ sufficient-to-show requests regarding
 28 data collection processes, metrics, issues and improprieties (RFP Nos. 2-4,
 6-10, 15, 16, 18). As is readily apparent from their RFPs, and as Plaintiffs
 have told Defendants, Plaintiffs do *not* seek raw census data from or regarding
 specific individuals. The protections of Title 13, which were meant to protect
 “raw census data reported by or behalf of individuals,” thus do not protect the
 disclosure of the sorts of internal documents and documents reporting
 aggregated data that Plaintiffs request here. *See Baldridge v. Shapiro*, 455
 U.S. 345, 361 (1982). Defendants have acknowledged that an appropriate
 production of such material would satisfy a large portion of Plaintiffs’
 narrowly-tailored requests—they just want to wait to produce all of it until the
 end of December.
4. Order Defendants to produce, by Monday, December 14, 2020, appropriate
 metadata—including MD5 Hash data, production begin bates, production end
 bates, production begin attachment, production end attachment, custodian,
 email from, email to, email cc, author, document date, and file name—for

their December 1, 2020 and December 8, 2020 productions. Order Defendants to produce appropriate metadata—including MD5 Hash data, production begin bates, production end bates, production begin attachment, production end attachment, custodian, email from, email to, email cc, author, document date, and file name—for all future productions in this case.

5. Order Defendants to make available for deposition no later than December 17, 2020, an additional Rule 30(b)(6) witness on the topics of Defendants' retention, organization, collection, review, and production of documents and data, as well as the search functionalities and capabilities of Defendants' various databases, so that Plaintiffs have definitive, sworn answers regarding key document production issues in this case, and meaningful guidance regarding how Defendants retain, manage, and organize data and how they are collecting and producing documents in this litigation, that will help finalize this portion of discovery without further delay.
6. Order that Defendants shall have 14 days instead of 30 days to respond to the narrowly tailored Interrogatories and Requests for Admission Plaintiffs will be able to craft and serve once they receive production of the key materials outlined above.

* * *

Defendants have understood for weeks that the Court ordered expedited discovery, but have repeatedly failed to meet their discovery obligations. Plaintiffs respectfully request that the Court grant Plaintiffs' motion as set forth above.

Dated: December 9, 2020

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21 **ATTESTATION**

22 I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this
23 document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred
24 in this filing.

25 Dated: December 9, 2020

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